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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS MERCADO, Defendant and Appellant.	B287597 (Los Angeles County Super. Ct. No. TA141949)

APPEAL from a judgment of the Superior Court of Los Angeles County. H. Clay Jacke II, Judge. Affirmed.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie Miyoshi and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Luis Mercado (defendant) appeals his carjacking conviction. Defendant contends that the conviction was not supported by substantial evidence showing a joint operation of act and intent. Defendant also contends that the trial court erred by incorrectly modifying an unnecessary instruction regarding after-acquired intent, and that the instruction was misleading when combined with incorrect legal argument by the prosecutor. As we find no merit to defendant's claims, we affirm the judgment.

BACKGROUND

Defendant was charged as follows: the attempted willful, deliberate, and premeditated murder of Daniel Rosales, in violation of Penal Code sections 664, subdivision (a), and 187, subdivision (a)[1]; the attempted willful, deliberate, and premeditated murder of Steven Tarin; with dissuading a witness by force or threat in violation of section 136.1, subdivision (c)(1); and with carjacking in violation of section 215, subdivision (a).

A jury found defendant guilty of carjacking, but was deadlocked as to the other charges, prompting the trial court to declare a mistrial as to those counts.

Months later, defendant entered into a plea agreement in which the prosecutor added count 5, assault with a deadly weapon in violation of section 245, subdivision (a)(1), with a special allegation of personal infliction of great bodily injury within the meaning of section 12022.7, subdivision (a), and dismissed counts 1, 2, and 3. Defendant pled no contest to the new charge and accepted a sentence of nine years in prison for the carjacking, plus a consecutive one-third the middle term (one year), for the assault, plus a three-year enhancement due to great

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

bodily injury. The trial court sentenced defendant according to the agreement for a total prison term of 13 years. In addition, the trial court ordered defendant to pay mandatory fines and fees, and calculated custody credits as 827 actual days and 124 conduct credits, for a total of 951 days.

Defendant filed a timely notice of appeal from the judgment, and the trial court issued a certificate of probable cause.

Prosecution evidence relating to carjacking

Angel Lepe (Lepe) testified that on August 31, 2015, at approximately 9:15 p.m., he was driving in the city of Paramount with his passenger, Ruby Rios (Rios). Lepe had known Rios for about six months, and she had been at his workplace with him earlier that day. After getting something to eat at a Taco Bell, Lepe drove to the area of San Jose Avenue and Myrrh Street, where Rios had plans to meet someone. A couple minutes after parking, a Latino man wearing a hoodie approached and got into the backseat of Lepe's car on the passenger side. Lepe recalled a very short greeting between the man and Rios, but Lepe was on his phone and music was playing, so he was not certain. The man then pulled out what Lepe thought was a weapon, possibly a knife, but more like a gun.

Lepe could not remember exactly what was said to him. Lepe initially testified that the man asked for his car, adding, "I can't remember if he asked for my car, but . . . I understood I was being robbed at the moment." Then Lepe testified that the man said "give me everything you have in the car or something like that," and then Lepe added, "He asked for things." Finally, the prosecutor asked whether Lepe recalled telling the police that the man said, "Give me all your fucking shit?" Lepe replied, "Okay. Yeah"; and he agreed that if that was what he said then, that was what was the man said. Lepe was afraid. After the man said,

"Give me all your fucking shit," he grabbed his phone, and while the man and Rios were still in the car, he got out of the car and ran. Lepe did not look back, but he heard the car drive away, and he then called the police, who arrived very quickly. Lepe identified his car in two photographs. In one photograph, there was a dent on the front grill of his car that was not there before the car was stolen.[2]

Sheriff Detective Miguel Fuentes served a search warrant at defendant's house while defendant was present and holding two cell phones, which Detective Fuentes took from him. A car matching the description of Lepe's car was parked in the driveway of defendant's home. A search of defendant revealed a set of keys in his pocket which fit the car parked in the driveway. Detective Fuentes identified the car in one of the same photographs used by Lepe.

Data from the two seized cell phones was extracted and read to the jury by Detective Fuentes.[3] The following text messages were exchanged between defendant and Rios, beginning with a greeting from Rios ("Ay Fooooooo") at 8:38 p.m. and ending at 9:00 p.m., 15 minutes before the carjacking:

"[Rios]: Help me come up on somebody."

"[Rios]: The guy that hit me."

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[2] On September 2, 2015, defendant assaulted Steven Tarin and Daniel Rosales by driving a car toward them and hitting them as the two men walked across the street near their homes in Paramount.

[3] The actual texts in the data printout contained many abbreviations, while the detective's reading of the messages was transcribed with more plain English and thus easier to understand. We therefore quote from the transcript of the reading, rather than from the exhibit.

"[Rios]: Come up on his money."

"[Defendant]: Ight fasho. You gonna scoop me up or what?"

"[Rios]: You have a gun or something? Ha hah. Scare this Nigga. I'm with him right now and he just cashed his check."

"[Defendant]: Yeah."

"[Rios]: Okay. Be ready. Almost there."

"[Rios]: Come to the parking kinda."

"[Defendant]: Okay."

Detective Fuentes read other text messages which were sent back and forth between defendant and Rios the following day between 1:46 a.m. and 2:25 a.m., including the following:

"[Rios]: The Sheriff's are giving me a chance to give up the car. . . . They know I don't have it. They know that I know who has it. I didn't say shit about . . . you so don't trip on that. I'm just trippen on what they can do to me if I don't return it."

"[Defendant]: That's what they want you to think. And stop tripping. They can't do nothing to you because they would been took you serio. And even if they do, they can't do nothing to you because you were just in that car when that happened. You didn't do nothing. Stay 100. You feel me?"

"[Defendant]: And no, they can't . You didn't do nothing why cause some random drug dealer you buy weed from just robbed him out of nowhere."

"[Defendant]: You're not getting locked up. And even if you are, you're straight, trust, if you ride it through, 'cause you didn't do shit and they would of been took you in."

DISCUSSION

I. Substantial evidence

Defendant contends that his carjacking conviction was not supported by substantial evidence. In particular, he contends there was insufficient evidence to support a finding that defendant formed the intent to steal Lepe's car before or at the time he brandished a weapon. In addition, defendant asserts that the evidence showed that the intent to steal the car was formed only after Lepe fled.

Carjacking is defined as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).) "In every crime . . . there must exist a union, or joint operation of act and intent . . . ." (§ 20.) Thus, "[t]he requisite intent -- to deprive the possessor of possession -- must exist before or during the use of force or fear. [Citations.]" (*People v. Gomez* (2011) 192 Cal.App.4th 609, 618, disapproved on another point in *People v. Elizalde* (2015) 61 Cal.4th 523, 538.)

When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*Ibid.*) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

"[B]ecause 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Defendant argues that abundant evidence supports a finding that before defendant entered the car, his intent was to deprive Lepe of personal property other than his car. He points to the text message from Rios asking him to steal Lepe's money. From his agreement to meet Rios, defendant argues that his intent must have been to steal money both before and after he entered the car. Defendant also points to Lepe's testimony that defendant got into the back seat, and suggests that he did not intend to take the car, because anyone who intended to take the car would have approached the driver's side and demanded that the driver get out, instead. Finally, defendant asserts that the demand for Lepe's personal property did not expressly include a demand for the car. He argues that even if the demand for *all* Lepe's personal property "incidentally included" car keys, it still would not suggest an intent to take the car "because, again, he

did not try to rob Lepe from the driver's window, where he could have easily removed him from the car and taken his place in the driver's seat."

We agree with respondent that defendant has merely invited this court to reweigh the evidence to arrive at a different conclusion from the jury. Substantial evidence review tasks us with determining whether substantial evidence supports the inferences drawn by the jury, not whether substantial evidence supports contrary inferences, as defendant has argued. (See *People v. Saterfield* (1967) 65 Cal.2d 752, 759.) Furthermore, a defendant does not meet his burden on appeal merely by summarizing the circumstances that support a finding in his favor without also showing that the jury's contrary finding cannot reasonably be inferred from the evidence. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1053-1054.)

"Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction. [Citations.]" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) "[A]n intent to steal may ordinarily be inferred when one person takes the property of another, particularly if he takes it by force, [although] proof of the existence of a state of mind incompatible with an intent to steal precludes a finding of either theft or robbery." (*People v. Butler* (1967) 65 Cal.2d 569, 573, overruled in part in *People v. Tufunga* (1999) 21 Cal.4th 935, 938-939 [claim-of-right defense inapplicable to robbery].)[4]

Defendant has shown only that under the circumstances, the jury *could have* inferred that defendant did not intend to take the car when he used force or fear upon Lepe, not that his state of

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[4] Because carjacking is very closely related to robbery, case law relating to robbery can be instructive. (See *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1142-1143.)

mind was incompatible with that intent. However, the circumstances also give rise to a reasonable inference that defendant intended to take the car when he drew a weapon and told Lepe to give him his car, or everything he had in the car, or *all* his "shit," by which he could have meant to include the keys to the car. The inference is particularly strong in light of defendant's subsequent driving away with the car.

We are persuaded by respondent's position that defendant's actions after Lepe fled the car support the reasonable inference that defendant's intent when he used force or fear was to deprive Lepe of the car. Defendant did not pursue Lepe to steal other belongings, but remained in the car, drove it away, and kept it despite Rios's requests to return it. Defendant was still in possession of the car nearly three weeks later when Detective Fuentes found it in his driveway.

Thus, absent proof that defendant did *not* intend to deprive Lepe of possession of the car when he used force or fear, we must accept the jury's reasonable inference that there was concurrence of such intent and the use of force or fear. We conclude that substantial evidence supported a finding that defendant intended to deprive Lepe of possession of his car at the time he used force or fear, such that a reasonable jury could find defendant guilty beyond a reasonable doubt.

II. No instructional error

Defendant contends that the trial court incorrectly modified CALJIC No. 9.40.2, the instruction regarding after-acquired intent, and that the error was compounded when combined with CALJIC No. 9.46, CALJIC No. 3.31, and incorrect legal argument by the prosecutor. He contends that the errors misled the jury into finding defendant guilty of carjacking notwithstanding the absence of the required concurrence of intent to steal and the application of force or fear.

Defendant acknowledges that his trial counsel did not object to the instructions, nor did he request clarification or any additional instructions.[5] Nevertheless defendant suggests that silence cannot effect a forfeiture of the issue on appeal. To the extent that any of the challenged instructions incorrectly stated the law, we agree that no objection was necessary. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1012.) However, "[a] trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. [Citations.]" (*People v. Lee* (2011) 51 Cal.4th 620, 638.) "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*Hudson, supra*, at pp. 1011-1012.) However, as respondent does not claim forfeiture, we discuss defendant's contentions.

Defendant first challenges CALJIC No. 9.40.2, a robbery instruction regarding after-acquired intent. Defendant faults the second sentence of the instruction for not having any obvious relevance to the facts in evidence at trial. Defendant also contends that the trial court incorrectly modified the instruction in order to make it applicable to carjacking by inserting

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[5] The trial court stated on the record that the court and counsel had met for a considerable period of time reviewing the court's proposed instructions, and asked defense counsel whether he proposed any additional instructions or had any objections to any of the court's instructions. The only additional instruction counsel requested was a modification of CALJIC No. 2.90, relating to the dismissed attempted murder counts. Defense counsel also indicated that he would make a similar request if the trial court chose to use CALCRIM instructions.

"carjacking" in place of "robbery." The trial court read CALJIC No. 9.40.2, as follows:

> "To constitute the crime of carjacking, the perpetrator must have formed the specific intent to permanently deprive the owner of his or her property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of carjacking has not been committed."

Defendant argues that as an after-acquired intent instruction was unnecessary, it could have confused the jury into failing to understand that the specific intent to deprive must have been formed before or during the use of force or fear. Defendant also contends that the court should have changed the phrase, "the specific intent to deprive an owner of his or her property" to "the specific intent to permanently or temporarily deprive the possessor of a motor vehicle of his possession." Of course, a motor vehicle is property, and while the instruction may have been too general or was not a complete statement of the intent requirement for carjacking, it is unlikely, in view of all the circumstances, that the instruction caused confusion, as the trial court had already made clear to the jury, by reading CALJIC No. 9.46, that the property taken in a carjacking must be a motor vehicle, and that the specific intent required was an intent to permanently or temporarily deprive the possessor of the motor vehicle.[6]

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[6] The trial court read CALJIC No. 9.46, as follows: "Every person who takes a motor vehicle in the possession of another from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently

Robbery requires concurrence of the intent to deprive the possessor of possession and the use of force or fear. (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) The California Supreme Court has repeatedly held in relation to robbery that that the general CALJIC instructions regarding the required elements of the crime, in conjunction with an instruction such as CALJIC No. 3.31[7] are adequate to inform the jury "'concerning the point in time the intent to steal must have been formed.' [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 361, quoting *People v. Hughes* (2002) 27 Cal.4th 287, 360; see also *People v. Hayes* (1990) 52 Cal.3d 577, 625; *People v. Hendricks* (1988) 44 Cal.3d 635, 642-643.) Given the similarity in the concurrence requirement, such case law is instructive here. (See *People v.*

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or temporarily deprive that person in possession of the vehicle of his or her possession, accomplished by means of force or fear, is guilty of the crime of carjacking in violation of Penal Code Section 215. . . . In order to prove [carjacking], each of the following elements must be proved: 1. A person had possession of a motor vehicle; 2. The motor vehicle was taken from his or her person or immediate presence or from the person or immediate presence of a passenger of such vehicle; 3. The motor vehicle was taken against the will of the person in possession; 4. The taking was [accomplished] by means of force or fear; and 5. The person taking the vehicle had the intent to either permanently or temporarily deprive the person in possession of the vehicle of that possession."

[7] Here, the trial court read CALJIC No. 3.31 to the jury as follows: "In the crimes charged in counts 1, 2, 3, and 4, as well as the gang allegations, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime or allegation to which it relates is not committed or is not true. The specific intent required is included in the definitions of the crimes or allegations set forth elsewhere in these instructions."

Hamilton, *supra*, 40 Cal.App.4th at pp. 1142-1143.) We conclude that the jury was adequately informed "'concerning the point in time the intent to steal must have been formed.' [Citation.]" (*Zamudio*, at p. 361.)

Defendant contends that argument by the prosecutor compounded the instructional error. The prosecutor summarized the elements of carjacking, relating them to the evidence, including the requirement that the taking was accomplished by force or fear. She then explained that the taking was accomplished *at the time* defendant displayed a weapon, thus arguing in effect that the intent to deprive Lepe of the car was formed before or at the time of taking the car by force or fear. In addition, the prosecutor correctly argued that "One of the instructions will say the intent must have been formed before or at the time of the act of taking the property." However, she went on to argue:

> "The text messages show clear intent prior to the taking. Substantially before, within the 15 minutes before the taking of the car, there were text messages talking about the taking of property. She was actually talking about taking his money. They were talking about robbing. Robbery and carjacking -- and you will see on some of these instructions it actually says 'robbing,' and then it says 'carjacking'-- are very similar. The only difference is the taking of property versus taking a car. The elements are actually, other than that, the same."

Although the prosecutor's argument contains an incorrect conclusion, we agree with respondent that as there was no instructional error, the prosecutor's statement could not have

"compounded" any instructional error.[8] Moreover, the court instructed the jury with CALJIC No. 1.00, which includes the following directive: "You must accept and follow the law as I state it to you, regardless of whether you agree with it. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." In light of this instruction, we presume that the jurors "'treat[ed] the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Mayfield* (1993) 5 Cal.4th 142, 179.)

The jury was also instructed with CALJIC Nos. 9.46 and No. 3.31, that a required element of carjacking is an intent to deprive the possessor of a motor vehicle of his possession, that the taking of possession must have been accomplished by force or fear, and that there must exist in the mind of the perpetrator a union or joint operation of act or conduct and the applicable specific intent. The prosecutor argued that the taking was accomplished at the time defendant used force or fear, and that "the intent must have been formed before or at the time of the act of taking the property." Under such circumstances there is no reasonable likelihood that the jurors were confused by the prosecutor's incorrect comparison of carjacking to robbery.[9]

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[8] We also agree with respondent that the claim is forfeited because defendant did not object to the argument or seek an admonition from the trial court. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1260.)

[9] Defendant suggests that the trial court should have given CALCRIM No. 1650, which expressly includes the following explanation: "The defendant's intent to take the vehicle must

Both parties agree that if the trial court had erred, the applicable test of prejudice due would be that of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Under that test, it is the defendant's burden to show a reasonable probability that he would have obtained a more favorable result absent the error. (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) Defendant argues that there can be no doubt that absent the alleged errors, the jury would have acquitted him if it had been instructed with CALCRIM No. 1650 instead of CALJIC No. 9.40.2, because the evidence did not support a finding of concurrence of act and intent. Defendant did not request CALCRIM No. 1650 and does not assign its omission as error. Furthermore, as we have previously concluded that substantial evidence supported a finding of concurrence and intent and that there is no reasonable likelihood that the jurors were confused by the prosecutor's argument on the subject, we also conclude that defendant has not met his burden under *Watson* to demonstrate reversible error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT

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have been formed before or during the time [he] used force or fear. If the defendant did not form this required intent until after using the force or fear, then [he] did not commit carjacking." Defendant did not request that instruction, nor was the trial court required to use CALCRIM instructions. (See *People v. Thomas* (2007) 150 Cal.App.4th 461, 466.)